FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 6 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 128

EMIL MOSBACHER,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

MARK EISNER,
FERDINAND TANNENBAUM,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Specification of errors	3
Reasons for granting the writ	3

Table of Cases Cited.

Jennings v. *Commissioner*, 110 F. (2d) 945	4
Johnston v. *Commissioner*, 86 F. (2d) 732	3
Klingenstein v. *United States*, 18 F. Supp. 1015	3
Neuberger v. *Commissioner of Internal Revenue*, No. 548, October Term, 1939	3
United States v. *Coulby*, 258 Fed. 27	4

Statutes Cited.

Act of February 13, 1925, Sec. 3(b), as amended May 22, 1939	1
Revenue Act of 1932, Section 23(r)(1) (47 Stat. 169)	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 128

EMIL MOSBACHER,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on January 8, 1940 (R. 20) and reported in 30 F. Supp. 703.

Jurisdiction.

Review is sought pursuant to the provisions of § 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939. The time to file this petition was extended by orders of Chief Justice Hughes, signed on March 26, 1940 and on May 8, 1940, until June 7, 1940.

Question Presented.

Whether, under § 23(r) of the Revenue Act of 1932, petitioner may offset losses on the sale of non-capital securi-

ties owned by him as an individual against his 91% share of the profits of a partnership derived from the sale of non-capital securities.

Statute Involved.

Section 23(r)(1) of the Revenue Act of 1932 provided as follows (47 Stat. 169):

> "(r) *Limitation on Stock Losses.*—
>
> (1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *."

Statement.

Petitioner sued in the Court of Claims to recover an overpayment of individual income taxes for the year 1932 in the sum of $64,802.76. Petitioner contended that he should be permitted to deduct a loss in the sum of $130,434.27 upon the sale of non-capital securities from his share of profits on the sale of non-capital securities in the sum of $128,476.17. Respondent contended that the set-off should not be allowed for the reason that the security profits had been realized by a partnership.

The Court of Claims found that, during the year 1932, petitioner was a member of a partnership, and that his share of the net profits of the business was 91% (R. 12). The court found that the Commissioner had refused to allowed petitioner to deduct individual losses on the sale of securities held less than two years in the sum of $130,349.89 against his distributive share of partnership security profits in the sum of $128,476.17 because of the fact that said profits had been realized through a partnership (R. 11).

The court held for the Government (R. 14-16), following the decisions of the Second Circuit in *Johnston* v. *Commissioner*, 86 F. (2d) 732, and of the Court of Claims in *Klingenstein* v. *United States*, 18 F. Supp. 1015, to the effect that individual security losses may not be offset against partnership security profits.

Specification of Errors.

1. The Court of Claims erred in holding that petitioner could not offset losses from the sale of non-capital securities owned by him individually against his 91% share of profits from the sale of similar securities realized by him and others in partnership.

2. The court below erred in giving judgment for respondent.

Reasons for Granting the Writ.

1. The question whether individual security losses may be offset against partnership security profits is now before the court in the case of *Neuberger* v. *Commissioner of Internal Revenue*, October Term 1939, No. 548, certiorari granted on May 27, 1940. In that case the Second Circuit followed its earlier decision in the *Johnston* case, *supra*, and refused to permit *Neuberger* to offset his individual security losses against his share of partnership security profits. This court's order of May 27, 1940, granted certiorari on this question.

Since the question presented by this case is already before the court in the *Neuberger* case, certiorari should also be granted in this case.

2. In following the *Johnston* and *Klingenstein* cases, the court below was applying the rule that partnership security profits do not retain their identity in the partner's hands under a statute limiting the deductibility of security losses

to security profits. This decision conflicts with decisions of the Fifth and Sixth Circuits. In *Jennings* v. *Commissioner*, 110 F. (2d) 945, decided by the Fifth Circuit on April 11, 1940, it was held that partnership gambling profits retain their identity in the partner's hands, and that therefore individual gambling losses may be offset against them under a statute limiting the deductibility of gambling losses to gambling profits. In *United States* v. *Coulby*, 258 Fed. 27, the Sixth Circuit held that a partner's share of partnership dividend income retained its identity in the partner's hands, and was therefore free of normal tax under a statute exempting individuals from normal tax on dividend income.

Since the decision of the court below is in conflict with the decisions of two circuits on a question of Federal tax law, this is a proper case for review by this Court, especially as the question whether the particular type of partnership income here involved (partnership security profits) retains its identity and may be offset by individual security losses is already before the court in the *Neuberger* case, *supra*.

Wherefore, it is respectfully submitted that the petition for certiorari should be granted.

MARK EISNER,
FERDINAND TANNENBAUM,
Counsel for Petitioner.

June, 1940.